SYRACUSE LAW REVIEW

# THE CHIEF AND US: CHIEF JUSTICE WILLIAM REHNQUIST, THE NEWS MEDIA, AND THE NEED FOR DIALOGUE BETWEEN JUDGES AND JOURNALISTS

Tony Mauro

Reprinted From
SYRACUSE LAW REVIEW
Volume 56, Number 3


Volume 56 Number 3 2006

# THE CHIEF AND US: CHIEF JUSTICE WILLIAM REHNQUIST, THE NEWS MEDIA, AND THE NEED FOR DIALOGUE BETWEEN JUDGES AND JOURNALISTS

**Tony Mauro**[†]

The death of Chief Justice William Rehnquist on September 3, 2005, brought to mind a number of memories of this unpretentious and interesting man from my twenty-five years of covering the Supreme Court.

He was a brilliant and modest jurist who loved the Supreme Court and loved history but did not, I am fairly sure, love the news media. In the few dealings he had with the reporters who covered the Court, he was courteous and even patient, but he viewed us as something of a distraction, not essential in any way to the functioning of the Supreme Court that he loved.

In this article I will mention some of my recollections, hopefully not in the manner of a self-important memoir that is more about me than about him. Rather, the point of my anecdotes will be to illustrate some larger themes about the relationship, such as it is, between journalists and judges—primarily at the Supreme Court, but by analogy at courts throughout the country. It is often a wary relationship, but it is a necessary and unavoidable one—and it could stand improvement, for the benefit of the judiciary and of legal journalism as well.

One quick illustration of the gulf between judges and the journalists who cover them is something the Chief Justice told several of us reporters over the years concerning one of the biggest problems we journalists face in covering the Court. In the natural rhythm of the Supreme Court's work, June is crunch time, when the Justices start cranking out sometimes long-pending opinions in advance of adjournment at the end of the month. Often, the most contentious—and therefore, usually the most

---

[†] Tony Mauro has covered the Supreme Court for twenty-five years, first for Gannett News Service and *USA TODAY*, and since 2000 for *Legal Times*, American Lawyer Media and law.com. He is the author of *Illustrated Great Decisions of the Supreme Court*, published by CQ Press in 2000, and published in its second edition by CQ Press in December 2005.

newsworthy—decisions the Court faces are issued in June, and sometimes more than one a day. On June 29, 1988, the final day of the 1987-1988 term, for example, the Court issued nine decisions filling 446 pages of the U.S. Reports. Among the nine were several closely watched decisions including *Morrison v. Olson*, the landmark decision finding that the independent counsel statute was constitutional.[1] For even the most nimble and experienced journalists covering the Court, sifting through and understanding all these writings in time to write intelligently about them before a deadline later that day was impossible.

As documented by my esteemed colleague Linda Greenhouse of the *New York Times*, this problem was brought to the attention of Chief Justice Rehnquist.[2] Could the Court not try to spread out the decisions, especially in the final weeks of the term? he was asked. Rehnquist's answer was classic, and stunning: "'Just because we announce them all on one day doesn't mean you have to write about them all on one day,'" Rehnquist said.[3] "'Why don't you save some for the next day?'"[4]

Rehnquist's answer had a sort of charming naiveté to it, as if we who cover the Court could simply agree among ourselves or with our editors to hold off reporting one or more of the Court's decisions until the next day. That would be the rough equivalent of journalists deciding that a President's State of the Union Address had too much in it and putting off reporting the second half of the speech until a day later.

But the Chief Justice's remark also displayed a profound lack of understanding about the most basic principles of how the news media work. For better or worse, we are in the business of getting the news of the day out to the public as quickly as possible—not salting some of it away for a rainy day.

I am not suggesting that Chief Justice Rehnquist or any other judge should automatically know or care deeply about how the press works. But the exchange suggests that much more needs to be done to help journalists and judges understand each other's work. With roles reversed, I am sure any reporter covering the courts, including myself, would say something just as boneheaded about the operation of the judiciary as what Rehnquist said about how we work. That is the point. Instead of glaring at each other from afar without comprehending, judges and journalists would do well to sit down and try to understand each other's needs, values, and methods of

1. 487 U.S. 654, 670-74 (1988).
2. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1558 (1996).
3. *Id.*
4. *Id.*

operation. It might result in adjustments on both sides that would be of help. (For example, since the crescendo of that day in June 1998, the Supreme Court has rarely, if ever, issued more than six opinions a day, even in June. Whether or not this change was a result of our queries to Rehnquist is unknowable.)

Useful dialogue between judges and the media already takes place at many levels, including: bench-bar-press programs in many states; programs sponsored by the Donald W. Reynolds National Center for Courts and Media in the National Judicial College;[5] and, at the federal level, a series of Justice & Journalism dialogues co-sponsored by the Freedom Forum's First Amendment Center.[6]

But this useful dialogue needs to occur more often, and in less formal ways. Though it often horrifies judges when I even suggest it, I know for certain that some judges talk with reporters, off the record, during criminal trials to help the reporters understand what is happening in the courtroom. The judge in the sensational Mike Tyson rape trial, for example, met informally with reporters covering the trial to answer their questions about procedure.[7]

In courthouses around the country, in far less notorious trials, similar exchanges occur every day. I always encourage journalists who cover the courts to call the judges they write about when they don't understand something, or simply to get acquainted. I am often pleasantly surprised to hear how often judges will respond to such approaches. In federal courts, especially at the appellate level, judges often feel isolated in their work and welcome the chance to talk about it, whether on or off the record. At the state level, where many judges stand for election or retention, many judges also find it in their interest to develop a relationship with the press. And certainly these exchanges benefit the press as well, in terms of accuracy, context, and simply a better understanding of what we write about.

The question of whether judges and journalists need each other brings me to another recollection about Rehnquist. It was a conversation at a social gathering at the Supreme Court more than a decade ago. Several of the reporters who cover the Supreme Court were standing in a group around Rehnquist, and as sometimes happens at such a gathering, an awkward silence fell over us; we had run out of small talk. After a few

---

5. *See* http://www.judges.org/nccm/ (last visited Jan. 22, 2006).

6. *See* http://www.firstamendmentcenter.org/about.aspx?item=Justice_Journalism (last modified Jan. 21, 2006).

7. *See* James McLaughlin, *Judge-Speak: The Working Relationship Between Judges and the News Media*, SECRET JUSTICE: JUDICIAL SPEECH 1, 2 (2004), *available at* http://www.rcfp.org/secretjustice/judicialspeech.

moments, Rehnquist stepped into the breach with this comment (paraphrased): "You know, the difference between us and the other branches of government is that we don't need you people of the press."

It was quite an icebreaker, and most of us either laughed nervously or fell silent; it was hard to know what to say next. I recall trying, respectfully, to counter what he said. The Court does need the press, I told Rehnquist, and it may even need the press more than the other branches. The President and Congress often communicate directly to the public, yet the Supreme Court never does. The only way the public learns of a Court ruling is through the media, I ventured, and I even offered a concrete example: *Gannett Co., Inc. v. DePasquale*, a 1979 decision of the Court.[8] Erroneous reporting about that case, I suggested, had led many lower court judges to close trials to the press and the public, and corrective reporting had stopped the trend until another ruling clarified things a year later: *Richmond Newspapers, Inc. v. Virginia*, which affirmed the presumption of openness that attaches to criminal trials.[9] After my brief attempt at defending the importance of the press to the Court, Rehnquist gave me a tepid smile, as if to say, "Nice try, but you haven't convinced me."

And nothing that occurred since that conversation ever really seemed to change Rehnquist's mind. As mentioned earlier, his attitude toward the press, matched by that of most of the rest of the Supreme Court, was one of bemused indifference, or grudging tolerance. Rehnquist knew that we who covered the Court had a job to do, but it was not terribly important to him. In a 1998 interview on C-SPAN, when asked whether he was considering retirement, Rehnquist replied, "Well, you know, if I were thinking of retirement, I don't think you'd be the first person I'd tell about it."[10] Host Brian Lamb persisted, asking about press speculation that was about to retire. "Oh, let 'em talk," was Rehnquist's reply.[11]

At one level, of course, Rehnquist was entirely correct in his view that the judiciary does not need the press. As life-tenured judges, members of federal Article III courts do not need to curry favor with the press or the public in the same way that elected Presidents and members of Congress usually do. Reporters who write about the executive and legislative branches, especially around election time, are made to feel very much needed by the officials they cover. Yet we at the Supreme Court can go months, or even years, without any one-on-one, or even small-group

8. 443 U.S. 368 (1979).
9. 448 U.S. 555, 573 (1980).
10. Interview by Brian Lamb with William Rehnquist, Chief Justice of the United States Supreme Court (C-SPAN television broadcast Oct. 20, 1998).
11. *Id.*

contact, with the nine individuals we cover. I, for one, have probably had no more than twenty-five conversations with Justices in twenty-five years of covering the Court, and only one on the record.[12]

And now, much more than when Rehnquist made those remarks, the courts, like the White House and Congress, have a way of directly communicating with the public without the filter of journalism. Through Project Hermes—blessed by Rehnquist himself and aided by the American Bar Association—the Court has made its opinions available electronically since 1990, soon after they are issued.[13] At first, this benefited news organizations most of all, but as the Internet developed exponentially, it has now become common for Court opinions to become widely available on many web sites within an hour of being issued by the Justices. Federal appeals and district courts have followed suit, and some of their sites even permit easy access to the audio of oral arguments online.[14] Blogs such as Howard Bashman's widely read *How Appealing* disseminate these links even more widely, so it is now easy for lawyers in Pennsylvania, say, to keep up almost instantly with the always-amusing writings of California-based Ninth Circuit Court of Appeals Judge Alex Kozinski.[15]

And yet, I would still argue that the courts still do need the press in important ways—and even more so than the other branches. As accessible as court rulings may be electronically, it is still true that a large number of them—including some of the most important ones—will be nearly incomprehensible to many members of the public. That is not to disparage the public, but rather to state the obvious: that the law has reached a level of complexity that puts many decisions beyond the reach of lay people (and many lawyers too). As Justice Antonin Scalia once famously put it, "That is why the University of Chicago Law Review is not sold at Seven-Eleven."[16] Of course, he made that remark to disparage not just the public, but the press for being unable to fathom what the Supreme Court does.

But whether or not the press meets Scalia's high standards, I would argue that even as the Internet Age advances into regions we cannot yet imagine, there will still be a role for journalists who explain to readers what Supreme Court rulings are all about—what, for example, the Court means

---

12. *See* Tony Mauro, *The Hidden Power Behind the Supreme Court*, USA TODAY, Mar. 13, 1998, at 1A.

13. *See* http://www.access.gpo.gov/su_docs/supcrt/hermes.html (last visited Jan. 22, 2006).

14. *See, e.g.*, http://www.ca8.uscourts.gov/oralargs/oaFrame.html, which enables users to access oral arguments of Eighth Circuit Court of Appeals cases.

15. *See* http://legalaffairs.org/howappealing (last visited Jan. 22, 2006).

16. Antonin Scalia, Francis Boyer Awards Lecture at the American Enterprise Institute Policy Conference (Dec. 6, 1989), in Federal News Service, Dec. 6, 1989.

when is uses phrases such as "strict scrutiny," "heightened scrutiny," "mid-level scrutiny," "undue burden," and "rational basis." (Come to think of it, however, I am not sure any mortal can fully explain those terms—not even the Justices themselves.)

But judges need journalists at a more fundamental level as well. Especially since they are unelected, federal judges often labor at the outer margins of public attention. That is not healthy for any democratic institution, even one like the judiciary that has been populated mainly by honest and dedicated public servants. Without the scrutiny of the press, for example, its ethical decisions about whether to recuse when conflicts of interest arise could easily get sloppy or worse.

The Courts' incremental impact on society through its decisions could also go almost unnoticed without the press. When the Supreme Court issues a decision on eminent domain like *Kelo v. City of New London*, as it did in June 2005,[17] it does not mail out an alert to all homeowners that their property rights may have been affected. It is left to the press to explain, as best it can, what has occurred. The public outcry that followed the *Kelo* decision turned quickly into calls for legislative action to counteract the Supreme Court's ruling. Bills have been introduced at the state[18] and federal[19] levels to prevent eminent domain powers from being used to transfer property from one private owner to another purely for the added tax revenue that might result. This entire process—Supreme Court action, followed by public and legislative reaction—is unfolding in a way that the framers of the Constitution would likely approve. Yet without the press playing its role, it seems unlikely that it would be happening at all, or at least not this quickly.

As early as 1823, Thomas Jefferson wrote, "There is no danger I apprehend so much as the consolidation of our government by the noiseless and therefore unalarming instrumentality of the Supreme Court."[20] If nothing else, the press makes it more difficult for the Supreme Court to act noiselessly.

Of course, as much as the courts need the press, the obverse is also emphatically true: the press needs the courts. The federal judiciary and

---

17. 125 S. Ct. 2655 (2005).

18. *See Current Proposed Local Legislation on Eminent Domain, at* http://www.castlecoalition.org/legislation/local/index.asp (last visited Jan. 22, 2006).

19. *See Current Proposed Federal Legislation on Eminent Domain, at* http://www.castlecoalition.org/legislation/federal/index.asp (last visited Jan. 22, 2006).

20. Letter from Thomas Jefferson to William Johnson (1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 421 (Andrew Lipscomb & Albert E. Bergh eds., Memorial ed. 1903-04), *available at* http://etext.virginia.edu/jefferson/quotations/jeff1060.htm.

especially the Supreme Court have made the modern-day news media possible—not just their responsible reporting, but their outrages and excesses as well. It is no exaggeration to say that without *New York Times Co. v. Sullivan*[21] and other press-protecting decisions, the news media would be a far more timid presence in the national landscape.

In light of the importance of this relationship, it may seem odd, then, that there is so little contact between Supreme Court Justices and reporters. Of the rare conversations journalists have had with Justices in the last few decades, most have been with Rehnquist.

For Supreme Court reporters in recent years, those encounters have taken place at the biennial lunches Rehnquist had with the twenty or so reporters who cover the Supreme Court regularly. The standing joke among reporters was that meeting with us every two years was all that Rehnquist could bear. But in fact the encounters did not seem to bother him, and most reporters, I think, enjoyed them as well. They were off-the-record, start to finish, so the details cannot be fully described. But they have been written about and alluded to often enough in general terms that now, especially after his death, something can be said about them.

The sessions began inauspiciously, as a continuation of the meetings his predecessor Warren Burger had with the Supreme Court press corps. They were dubbed "wage and hours" sessions, dominated by discussion of how reporters' working conditions at the Court could be improved, such as by improving the acoustics in the press section in the Court chamber.

At one such meeting, when one of us asked if the Justices could be more forthcoming about their health conditions when they are hospitalized, Rehnquist's usually affable mood darkened. "You people are really vultures when it comes to that sort of thing," Rehnquist told us.[22] Given Rehnquist's strong view that medical information about Justices should be kept private, it was unsurprising that when Rehnquist himself was hospitalized with thyroid cancer in October 2004, the Court released only scant information about the nature of his illness and his treatments.[23] As a result, the press was left to speculate, along with medical experts, about how Rehnquist was doing. Privacy was protected, I suppose, but at the expense of accuracy.

---

21. 376 U.S. 254 (1964).

22. Lest it be thought that I am violating the off-the-record ground rules, note that this quotation appeared in RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 125 (1994).

23. *See* Press Release, Supreme Court of the United States, Press Release Regarding Chief Justice William H. Rehnquist (Oct. 25, 2004), *at* http://www.supremecourtus.gov/publicinfo/press/pr_10-25-04.html.

But the off-the-record sessions with Rehnquist improved over time, ending up as fairly formal luncheons in one of the Court's ornate conference rooms. Journalists were seated more or less by seniority—just as the Justices are in the court chamber—and at each of our place settings sat an ashtray, a nod to the fact that Rehnquist smoked cigarettes. No one besides Rehnquist ever smoked at the lunches, as best I can recall.

Rehnquist would field questions in a friendly way, and would often tell stories about books he was reading or his non-work related pursuits. When he told a funny story, he would often start laughing before he finished his sentence; he had a disarming directness and a sharp wit.

For many of us, the lunches added a dimension to our understanding of Rehnquist that we otherwise never would have had. To the general public, Rehnquist often seemed gruff or colorless; at the private lunches, he was far more animated and friendly, and spoke of many other interests and hobbies besides the law. Cynics would likely say Rehnquist was trying to manipulate the press through these contacts, and furthermore that he succeeded; indeed when he died, the obituaries written by Supreme Court journalists, myself included, were overwhelmingly positive. One commentator even took the press to task for ignoring negative aspects of Rehnquist's career in those obituaries.[24]

Whether or not such a cynical spin is merited, the lunches benefited the press and public as well as Rehnquist. In addition to providing personal anecdotes about him,[25] the lunches seemed to promote progress toward small steps that enhanced Court transparency.

Without going into great detail, I'll say that when one change was discussed at the 2004 lunch, Rehnquist reacted with surprise; he thought the change had already been made. He promised he would inquire into the matter. A few months later, the Court formally announced that starting in October 2004, oral argument transcripts would include the names of the Justices asking the questions.[26] Previously, the transcripts did not name which Justice asked which question, confounding historians and journalists.

---

24. *See* Jack Shafer, *Rehnquist's Drug Habit* (Sept. 9, 2005), *at* http://www.slate.com/id/2125906.

25. It was at his last lunch with us in 2004, for example, that he told the priceless story of how his middle name changed from Donald to Hubbs when he was a teenager. (It was a story widely re-told in obituaries and recollections after his death; hence, it does not seem that telling it here would violate the ground rules.) His mother happened to meet a numerologist who, after asking several questions about her son, advised that he would have greater success in life if his middle name began with H. So she had it changed to Hubbs, an old family name, much to the chagrin of her husband.

26. *See* Press Release, Supreme Court of the United States, Oral Argument Transcripts (Sept. 28, 2004), *at* http://www.supremecourtus.gov/publicinfo/press/pr_09-28-04.html.

It was a small but meaningful step that improved public understanding of the Court.

Another significant improvement in public access to the Supreme Court discussed at the lunches and other forums was the quick release of audiotapes of Supreme Court oral arguments.

The Court has long taken pride in the fact that Supreme Court oral arguments have throughout history been open to the general public. But they are open only to the several hundred who can attend in person.[27] The Court made a limited exception to that rule some years ago by feeding the audio portion of arguments into the nearby lawyers' lounge, which can accommodate upwards of fifty members of the Supreme Court bar.[28] That move was significant because it marked the first time that any members of the public—in this case, members of the Supreme Court bar—could listen to oral arguments in real time outside the four walls of the Court chamber. Efforts to extend that precedent went nowhere in years since. So until 2000, the only way for non-lawyer members of the public to hear oral arguments on the day they occurred was to be inside the Supreme Court's chamber. (Listening to the tapes after argument day is hardly easier; at the end of each term, audiotapes are transferred to the National Archives where, after several months of processing, they are made available to the public—up to a year after they occurred.)

The Court budged from its iron rule for the extraordinary presidential election cases of 2000, *Bush v. Palm Beach County Canvassing Board*[29] and *Bush v. Gore*.[30] In light of unprecedented public interest in the cases, media organizations petitioned for live television or radio broadcast coverage. They were turned down, but the Court did assent to a more modest request by C-SPAN.[31]

The Court agreed to release, for public and broadcast use, audiotapes of the oral arguments as soon as possible after the arguments were over. The Court apparently felt this was not a real change in policy, but rather an acceleration of what it was already doing when it transfers tapes to the

---

27. By one count, the Court chamber contains "approximately 300" seats to be divided among lawyers, the public and the news media. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 248 (2003).

28. It is difficult to determine when the audio of arguments first was transmitted to the lawyers' lounge, but press references to the practice began appearing in the mid-1990s. *See* Fish Story *in* Tony Mauro, *Extra Time, Extraordinary Argument*, LEGAL TIMES, Mar. 24, 1997, at 8.

29. 531 U.S. 70 (2000).

30. 531 U.S. 98 (2000).

31. *See Supreme Court to Make Audiotape Available*, MIAMI HERALD, Nov. 29, 2000, at 31A.

National Archives months after they take place. For the Florida election cases, the Court was willing to move up the release to within minutes after the completion of arguments. It was done on both December 1, 2000, for the first of the two election case arguments, *Bush v. Palm Beach County Canvassing Board*,[32] and on December 11, 2000, for the fateful arguments in *Bush v. Gore*.[33] The result was, for many members of the public nationwide, an eye-opening view of the Supreme Court at work. The availability was widely hailed as a positive step that helped the press and public understand the complex and fast-moving events of the election controversy. Justices themselves privately indicated that they were satisfied with the experiment in quick, if not simultaneous, access.

In various contacts between journalists, Justices and Court officials, the cautionary advice from inside the Court building was this: do not expect the experiment will be repeated routinely or anytime soon. In fact, the procedure has been repeated only a handful of times since 2000. The 2003 affirmative action cases were handled in this expedited way, as were the arguments over the constitutionality of the McCain-Feingold campaign finance reform laws. But other cases, such as the two Ten Commandment cases argued in the 2004 term, did not meet the Court's elusive criteria. Unless new Chief Justice John G. Roberts Jr. changes course, it seems likely that early release of audiotapes will occur infrequently.[34]

Nor does it seem likely that the Justices' longstanding distaste for allowing cameras into the Supreme Court will soften soon—again, unless the new Chief Justice wants the policy to change. Chief Justice Rehnquist was never as vehement in opposing cameras in the court as was his predecessor Warren Burger. But in candid moments, Rehnquist said it was really not something he or his colleagues were very interested in. The Justices highly prize their privacy and anonymity, as do most judges, at least on the federal level. They have no desire, by and large, to become media personages, or to find themselves written about in their non-judicial capacities.

This attitude, too, widens the gulf between judges and journalists. Judges need not become celebrities, but they would do well to find ways in which they can engage the public more fully, and respond to modern

---

32. 531 U.S. 70 (2000).

33. 531 U.S. 98 (2000).

34. Indeed, even after the affirmative action arguments, Justice Anthony Kennedy, speaking at a House Appropriations Committee subcommittee hearing on the Court's budget on April 9, 2003, said, "I don't think it is going to be a common practice." Tony Mauro, *Sentencing, Clerkships Discussed at High Court Budget Hearing* (Apr. 10, 2003), *at* http://www.law.com/jsp/article.jsp?id=1048518272085.

media. All too often, it appears that Justices and judges seem to think that if they close their eyes tight, the media will eventually go away. But especially at a time of heightened interest in the courts, that is not likely to happen. We will continue to cover the courts—with respect, yes, but also with the same inquisitive and even critical eye that we use in scrutinizing any other government institution.

In one of his last interviews with C-SPAN—he did them often when a book of his was about to be released—Rehnquist expressed an almost nostalgic vision of being a Supreme Court Justice who is able to stand apart from the modern media culture. Whether that vision died when he did remains to be seen. Rehnquist put it this way:

> Well, I think it's a very good job. I have no regrets at all about ever being an Associate Justice or about being Chief Justice. I think it's a remarkable opportunity. And to me, one of the most appealing things about it, either as an Associate Justice or as Chief Justice, it enables you to participate in some way and to some extent in the way the country is governed, but you're able to maintain a private life as well. You don't have to become a celebrity or raise your visibility in order to do your job.[35]

35. Interview by Brian Lamb with Chief Justice William Rehnquist (May 11, 2004) (C-SPAN2 television broadcast, May 15, 2004) (copy of partial transcript on file with author).